Supreme Court, U.S.
FILED

99 910 NOV 29 1999

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JUAN ANTONIO TAPIA-ORTIZ,
Petitioner,

v.

RALPH K. WINTER, JOHN M. WALKER, JR., JOSE A. CABRANES, and ALLEN G. SCHWARTZ,
Respondents.

Petition for a Writ of Mandamus and Prohibition to the United States Court of Appeals for the Second Circuit

---

PETITION FOR
A WRIT OF MANDAMUS AND PROHIBITION

JUAN ANTONIO TAPIA-ORTIZ
#37427-053
FCI Allenwood, Unit 3B
Post Office Box 2000
White Deer, Pennsylvania 17887

Pro se

468

RELIEF REQUESTED

The following relief is requested by the Petitioner:

1. That the Respondents be ordered to address the *issues raised.*

2. That the Respondents be ordered to allow the Petitioner access to the special grand jury, pursuant to 18 U.S.C. § 3332(a).

3. That the Respondents be prohibited from sitting in judgment when they are the defendants.

PARTIES BELOW

Petitioner Juan Antonio Tapia-Ortiz was the plaintiff-appellant in the court below. Respondents Ralph K. Winter, John M. Walker, Jr., and Jose A. Cabranes were the three-judge panel that refused to address the issues that petitioner raised in his appeal brief and who have denied the petitioner access to the New York special grand jury, pursuant to 18 U.S.C. § 3332(a). Respondent Allen G. Schwartz was the district court judge who initially refused to address the petitioner's issues and dismissed his Complaint.

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Petition for a Writ of Mandamus and Prohibition to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION

Juan Antonio Tapia-Ortiz, on behalf of himself, hereby petitions for a writ of mandamus to order the repondents to address the issues raised in his appeal brief in the Second Circuit submitted on July 13, 1999. Respondents Winter, Walker, and Cabranes, judges of the United States Court of Appeals for the Second Circuit Court filed their decision on August 2, 1999 affirming the decision of the lower court, respondent Allen G. Schwartz. The petition for rehearing was denied by the same three-judge panel on September 23, 1999. There was no good-faith determination in either the district court or the Second Circuit Court of Appeals of the *issues* that petitioner *raised*, including the denial of petitioner's access to the special grand jury.

OPINIONS BELOW

The Court of Appeals' opinion is reproduced on pages 3a-8a of the Appendix to this mandamus petition (hereafter "Pet. App.") and is reported at 185 F.3d 8 (2nd Cir. 1999). The Order denying rehearing is reproduced at Pet. App. 1a-2a. The unreported District Court Order is reproduced at Pet. App. 9a-12a.

JURISDICTIONAL STATEMENT

The Court of Appeals opinion was entered on August 2, 1999. A petition for rehearing was timely filed and denied on September 23, 1999. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fifth Amendments to the United States Constitution and 18 U.S.C. § 3332(a).

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger nor shall

any person be subject for the same offence to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation.

18 U.S.C § 3332(a) provides:

It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

STATEMENT OF THE CASE

Petitioner is a pro se litigant who attempted to litigate his grievances concerning an obstruction of justice conspiracy engaged in by the respondents, pursuant to 18 U.S.C. § 1964(a), 28 U.S.C. § 1331, § 2201 and § 2202, and 18 U.S.C. § 3332(a).

The original complaint was filed on October 15, 1998. The gist of the complaint is that Second Circuit appellate panels do not address the *issues raised* in many cases, including petitioner's, and that petitioner has been blocked from access to the New York special grand jury by the respondents.

Petitioner is further informed and believes thereon that staff attorneys, not Article III judges, are the ones actually deciding Second Circuit cases. Such decisions are then presented to Article III judges, who were approved by Congress, for rubber-stamp approval, denying petitioner of *meaningful* access to the courts.

REASONS FOR GRANTING THE WRIT

The Writ must be granted in order to stem the rising tide of public dissatisfaction with the federal judiciary.

> No argument is needed either for the layman or the lawyer to prove that the administration of justice is the most important function of government. It is, of course, the *sine quod non* of organized society. And yet, it is probable that the judiciary is the least efficient of all classes of functionaries.
>
> That this assertion is not consonant with conventional attitude will be admitted. But upon investigation I am confident it will be found that our habitual reverence for the judiciary is the adumbration of hope rather than of faith. It is a form of whistling to keep the courage up. Confidence in the triumph of justice is a necessity of the human mind. We must believe in the superior integrity and intelligence of the supreme power or become anarchists. The moment we lose faith in the courts we lose faith in organized society. And so we "hope when hope is gone."
>
> Due to our fear of finding what we dread, we have persistently refused to subject judicial officials to the same scrutiny we would apply to others. In presence of the most perverse judicial action we are expected to kneel, cross ourselves, and pray that we may be granted intelligence to see the wisdom of it.

My aim is to show that this attitude, so far from prompting higher efforts on the part of the judiciary, is the main cause of the inefficiency of that branch of the public service.

There are three principal classes of inefficient judges, viz: those who lack the ability of judicial discrimination, those who have lost their power through senility, and those who have lost interest in their work.

The last class is by far the most dangerous as well as the most numerous.

And again I take issue with conventional opinion as to the comparative merit of life tenancy and tenancy for years on the bench,—or, which is generally the same, appointive and elective judges.

The average ability of the federal judges I concede to be superior to the average ability of the state judges. This is due mainly to the fact that under the elective system we see at times men elevated to the bench who are so far below mediocrity both in intelligence and integrity as to lower the general average for the state, while these freaks are kept off the bench. But this does not mean that also the general *efficiency* of the federal judiciary is superior to that of the judiciary of the states. I have no hesitancy in declaring the contrary to be the case.

In the first place, the federal bench has a large number of superannuates; in the second place, it has its share of general incompetents, and thirdly, it has a superabundance of men who have lost all interest in their science, and hold on only to receive homage and draw salary. These people perform their duties as a rule, perfunctorily. Only occasionally do they take an interest in a case. They are answerable to nobody.

Nobody may inquire. The injured party is not in position to complain. No one would believe him if he did. His lawyer must smile and say he was evidently mistaken, for he has another case before the same court next week; or, at most, he can be placed in category with Byron's Jack Bunting, of whom we read:

"He knew not what to say, and so he swore."

As a general principle it will probably be conceded that a public official who is answerable only to his own conscience is an anomaly in modern society. He is a survival of a medieval institution. Now, it is a matter of history, readily demonstrable, that officials answerable only to their own conscience develop, as a rule, the most brutal propensities. Has the effect on the judiciary been otherwise?

When I undertake to promulgate the unconventional doctrine that the judiciary is the least efficient branch of the public service, I do so with the full realization of the fact that the burden of proof rests upon myself. Samples of the evidence which may be produced will be submitted in the form of illustrations which are also demonstrations of the correctness of my proposition, at least in part.

Here is a typical case which is not a fiction, but a fact:

Plaintiff sued on an account for some few thousand dollars. Defendant denied the indebtedness and set up four counterclaims. On trial the court dismissed the first counterclaim, but the jury rendered a special verdict in favor of the defendant for all that was asked in each of the other three counterclaims. The general verdict, however, was in favor of plaintiff,—the amount found due defendant on the last three counterclaims

being deducted from the amount found due plaintiff on his cause of action. Defendant appealed, alleging various errors of the trial court which had resulted in the dismissal of the first counterclaim.

In preparing the bill of exceptions all evidence bearing upon and all reference to the three last counterclaims were carefully eliminated. Those questions had all been decided in favor of defendant, and, of course, no error touching them was, or could have been, assigned.

What happened in the court of appeals? That tribunal filed an opinion stating with grave judicial dignity, after reciting seriatim from the answer the general allegations setting up the three last counterclaims, that it (the court) had carefully examined the evidence bearing upon counterclaims two, three, and four, and find that it was sufficient to justify the court in submitting them to the jury.

Reflect on this action of this dignified body, too sacred to be criticized.

After this clear misstatement of a fact, that it had investigated records not in existence, and decided questions not before it or in any way arising in the case, the court closes its "opinion" with the impressive assurance that "we have carefully examined the other questions raised and conclude that no reversible error has been committed."

What assurance have we that the last statement was not as false as the first? As a matter of fact, not one of the questions actually submitted had even been alluded to by the court.

In another recent case decided by a federal court of appeals the construction of a written contract was involved. The lower court had held that a certain clause in the document was inoperative. The aggrieved party appealed and argued that the clause was valid and binding on both parties. The court of appeals, after citing the clause, said: "The lower court held, and we think rightly, that this proviso was binding on both parties. The judgment is consequently affirmed."

It is obvious that in neither of those cases had the judges, or either of them, read appellant's brief, much less the records. If those gentlemen have any regrets it is that the court was "caught with the goods" and that they cannot hide their perfidy behind the convenient screen that the law is only a matter of opinion anyway. Aside from that feature these cases are not exceptional. They are quite typical of the indifference with which possibly the majority of the cases decided by the same tribunal are examined.

This statement will be challenged as extravagant, but by whom? By Mr. Soandso, the famous lawyer, and by Judge Somebody, the celebrated jurist. These men, of course, have no cause for complaint. Their fame insures them a hearing. But I am speaking for the other Ninety-nine our of every one hundred of the active practitioners.

Some time ago a young lawyer within my acquaintance had two cases before the same appellate tribunal during the same session and involving one and the same identical question of law. This lawyer had won the first case and had lost the other. Both were appealed. The cases were decided thirty days apart and both were affirmed. The one question raised had been decided diametrically opposite in the two cases. In one case the

court held one contention was law, and in the other that the very opposite was law. Both decisions showed the court had not studied either case.

What was to be done? The young lawyer, knowing that as a general rule motions for rehearing are not read, addressed a personal letter to one of the judges who had sat on the case, and with whom he was socially on friendly terms, calling his personal attention to the discrepancy. The letter emphasized the fact that he was a good loser and could stand a defeat, but he objected to being "whipsawed." This proved effective. Rehearing was granted, and the case reversed. But why reversed? Simply because at that time the period for ordering a rehearing in the other case had expired, and to harmonize the two the last case had to be reversed, right or wrong. The young lawyer ultimately won both cases, when, as a matter of fact, had the position of those cases been interchanged on the calendar he would have lost both.

At this point some sage will suggest that it was quite immaterial which way the question was decided, so long as it was definitely settled. But what of the litigants? What of the "sacred right of property?" What of this frivolous juggling with other people's belonging? What if both had been criminal cases? Would it have been immaterial whether the court had decided that both should hang or neither should hang?

I have a friend who has a decided genius for law. He was for some years brief writer for one of the famous lawyers of the country, but for many years past has practiced for himself. He informs me that whenever he appeals a case he borrows the name of his former employer as an ornament for the front cover of his brief. That insures consideration. It is sad experience

has taught him that lesson, for, in spite of his ability, fame has not come to him personally.

It is, of course, difficult, in fact, impossible, to determine how large a percentage of the cases before the federal courts of appeals receive fair consideration. From whatever investigation I have been able to make I would think that not over ten per centum of the questions argued are touched at all in the opinion. Of course, not all of them need be decided in order to reverse, but all, as a rule, should be passed upon in order to justly affirm the judgment.

It is no secret that the average appellate judge, after he has been on the bench a few years where the excitement of the trial is absent as stimulus to his mentality, loses interest in jurisprudence as a science, and he gets to hate the sight of a brief. Each session he may for one reason or another, become interested enough in a few cases to study them. The rest he passes on pro forma. If it becomes his duty to write an "opinion" in the latter class of cases, he will most probably take the opinion, or some opinion of the lower court, and follow that, even to the extent of quoting the misquotations, thus leaving the marks by which the process of "careful examination" may be discovered and exposed.

Work on the bench soon becomes drudgery to the average mind and my observations lead me to the belief that, as a general rule, a district judge temporarily assigned to appellate bench does more efficient work than the average circuit judge. The reason is obviously not a difference in ability, but a difference in the enthusiasm with which each goes at the task.

The effect of this lamentable indifference of the court is only too apparent. Not only does the lawyer soon lose

interest in jurisprudence as a science, but his client becomes an anarchist.

Take a case like either of the first two above cited. The aggrieved party read and reread the briefs as well as the transcripts. His mind is fed on nothing else during the three months waiting for the action of the court. He knows every point raised. He can repeat every argument advanced. All his savings through a lifetime are tied up in the case. He knows he is right. Then comes the decision. It deals with none of the points argued. It shows on its face the court refused to read the brief. He had been tossed aside like a white chip. He knows, and his friends know, he has been denied his day in court.

To that man, to his family and to his friends, organized society is organized iniquity.

And the present system is manufacturing citizens of such sentiments by the thousands every year.

Underneath the social unrest of the world to-day, as its main underlying cause, is the feeling in the breasts of the masses that justice is not for them. They do not know the cause, nor can they suggest the remedy,—and so they only want to destroy. Society to them has come to mean organized injustice.

The situation here presented is one which constitutes a clear and special call upon the bar for definite action. To remain silent is treason. It will not do to cover the situation under gown and wig and try to assure the world that all is well. It will not do any longer by any show of reverence for the office not earned by the occupant, to attempt to hypnotize either ourselves or

the masses into the belief that the judges are superior beings.

And a remedy reasonably effective is reasonably simple. If a tribunal were established with power to investigate and remove, or recommend for removal, grossly inefficient judges, there is no doubt that during the first year such tribunal would be swamped by complaints founded upon decisions akin to those I have cited above. The mere existence of such a tribunal would put life in the dead bones of the present courts. A few removals would renovate the whole institution. A delay in the matter by those in authority is criminal.

John Rustgard, *Dry Bones on the Bench—The Remedy for the Evil,* 88 Central Law Journal 341 (May 9, 1919) (John Rustgard was the U.S. District Attorney, 1st division of Alaska, 1910-1914, and the Attorney General of the Territory of Alaska, 1921-1933)

I. THE SECOND CIRCUIT COURT OF APPEALS DENIES A LITIGANT DUE PROCESS WHEN IT REFUSES TO ADDRESS THE *ISSUES RAISED.*

The petitioner's original complaint is included at Pet. App. 13a - 27a. A simple comparison of petitioner's original complaint, the district court order of October 22, 1998, and the appellate panel decision of August 2, 1999, illustrates quite clearly that at *no time* did the respondents ever address the *issues raised* by the petitioner in this action.

II. THE SECOND CIRCUIT COURT OF APPEALS HAS DEFIED AN ACT OF CONGRESS AND IGNORED THE PRECEDENT OF THIS COURT.

Where, as here, congressional intent is clear, our sole function is to enforce the statute according to its term.

Pa. Dept. of Public Welfare v. Davenport, 110 S.Ct. 2126, 2133-2134 (199).

The sole function of the court is to enforce the law according to statute.

Caminetti v. United States, 37 S.Ct. 192, 194 (1917).

It is the duty and right . . . of every citizen to assist in prosecuting, and in securing the punishment of any breach of the peace of the United States.

In re Quarles, 15 S.Ct. 959, 960-961 (1894)

[A citizen] has a constitutional right to inform the government of violations of federal law . . . [a] privilege of citizenship guaranteed by the Fourteenth Amendment.

Equal Employment Opportunity Commission v. Pacific Press Publishing Association, 676 F.2d 1272 (9th Cir. 1982).

[I]nforming is a right or privilege secured by the Constitution or laws of the United States.

Velarde-Villarreal v. United States, 354 F.2d 9 footnote 3 (9th Cir. 1965)

III. NO MAN CAN BE A JUDGE IN HIS OWN CASE.

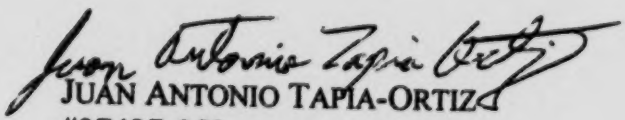
The respondents make much of the "rule of necessity." That rule would apply only if the petitioner were suing every federal judge in the United States. *Other* circuits convene judges from *outside* their *own* circuit(s).

See *In re Murchison*, 349 U. S. 133, 136 (1955) (Black, J.) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); *Spencer v. Lapsley*, 20 How. 264, 266 (1858) (recognizing statute accords with this maxim); see also Publius Syrus, *Moral Sayings* 51 (D. Lyman transl. 1856) ("No one should be judge in his own cause."); B. Pascal, *Thoughts, Letters and Opuscules* 182 (O. Wight transl. 1859) ("It is not permitted to the most equitable of men to be a judge in his own cause."); 1 W. Blackstone, *Commentaries* *91 ("[I]t is unreasonable that any man should determine his own quarrel.").

CONCLUSION

For the reasons set forth above, this petition for a writ of mandamus and prohibition should be granted.

Respectfully submitted,



JUAN ANTONIO TAPIA-ORTIZ
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FCI ALLENWOOD, UNIT 3B
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Pro se petitioner

Dated: October 28, 1999

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23 day of September one thousand nine hundred and ninety-nine.

Filed September 23, 1999

Present:

Hon. RALPH K. WINTER
Chief Judge
Hon. JOHN M. WALKER, JR.
Hon. JOSE A. CABRANES
CIRCUIT JUDGES,

TAPIA-ORTIZ
Plaintiff-Appellant

v. Docket No. 99-7035

WINTER
Defendant-Appellee

A petition for panel rehearing having been filed herein by the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk

By: /s/ Beth J. Meador,
Beth J. Meador
Administrative Attorney

pethrg_frm

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Submitted July 13, 1999 Decided August 2, 1999)

Docket No. 99-7035

JUAN ANTONIO TAPIA-ORTIZ,

Plaintiff-Appellant,

— v. —

RALPH K. WINTER, AMALYA LYLE KEARSE, JOHN M. WALKER, JR., JOSEPH M. MCLAUGHLIN, DENNIS G. JACOBS, PIERRE N. LEVAL, GUIDO CALABRESI, JOSE A. CABRANES, FRANK I. PARKER, CHESTER J. STRAUB, ROSEMARY S. POOLER, ROBERT D. SACK, J. EDWARD LUMBARD, WILFRED FEINBERG, JAMES L. OAKES, ELLSWORTH A. VAN GRAAFEILAND, THOMAS J. MESKILL, JON O. NEWMAN, RICHARD J. CARDAMONE, ROGER J. MINER, FRANK X. ALTIMARI, THOMAS C. PLATT, JR., ANDREW WEISSMANN, EILEEN SHAPIRO, and several unknown staff attorneys,

Defendants-Appellees.

Before:

WINTER, *Chief Judge*
WALKER, and CABRANES, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York (Allen G. Schwartz, *Judge*) dismissing a complaint against twenty judges of the United States Court of Appeals for the Second Circuit, their staff attorneys, a district judge, and an Assistant United States Attorney. We hold that this panel is not disqualified to decide the appeal under the rule of necessity and affirm.

JUAN ANTONIO TAPIA-ORTIZ, *pro se*, White Deer, Pennsylvania, *for Plaintiff-Appellant*.

MARY JO WHITE, United States Attorney for the Southern District of New York (Lisa R. Zornberg, Gideon A Schor, Assistant United States Attorneys, of counsel), New York, New York, *for Defendants-Appellees*.

PER CURIAM:

Juan Antonio Tapia-Ortiz, *pro se*, appeals from Judge Schwartz's order dismissing his complaint against twenty judges of this court, including each member of this panel; the Second Circuit staff attorneys; a district judge; and an Assistant United States Attorney (AUSA). Appellant is a federal prisoner who alleges that the defendants have violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, by conspiring to obstruct justice. Judge Schwartz dismissed appellant's complaint *sua sponte* pursuant to Section 805 of the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915A(b)(1), because he found it was "frivolous" and "malicious." We hold that, under the rule of necessity, this panel is not disqualified from deciding appellant's appeal and affirm.

Appellant was convicted in 1992 for narcotics offenses, *see United States v. Tapia-Ortiz*, 23 F.3d 738, 739-40 (2d Cir. 1994), and is currently serving a prison term for these

crimes. In 1994, he brought a civil action in the Eastern District against the federal law enforcement agents who arrested him and later added the federal government as a defendant. The district court granted the defendants' summary judgment motion. *See Tapia-Ortiz v. Doe*, 171 F.3d 150, 151 (2d Cir. 1999) (recounting history). On appeal, we affirmed as to the law enforcement agents but vacated as to the government. *See id.* at 152.

The instant complaint was filed after appellant appealed his civil case but before we decided that appeal. In the complaint, appellant alleges as RICO "predicate acts" that this court's judges and staff attorneys have failed to properly address the issues raised in cases on appeal. The complaint reflects fears that we would not adequately address the issues raised in his civil appeal and further alleges that the district judge presiding over both his civil and criminal cases participated in a conspiracy to deny him due process. Appellant does not allege any specific facts, but only that the judge was "biased." Finally, appellant alleges that the AUSA who prosecuted his criminal case presented false testimony from one witness and "bribed" other witnesses to testify pursuant to plea agreements. Appellant requests various forms of declaratory and injunctive relief, including an order that all judges in this circuit recuse themselves from adjudicating his claims. The district court dismissed the complaint *sua sponte* pursuant to Section 1915A.

In ordinary circumstances, each of us would be disqualified from deciding this appeal. *See* 28 U.S.C. § 455(b)(5)(i) (providing that a federal judge "shall . . . disqualify himself [when] [h]e . . . [i]s a party to the proceeding"). However, under the "rule of necessity," a judge is qualified to decide a case even if he has an interest in it when "the case cannot be heard otherwise." *United States v. Will*, 449 U.S. 200, 213 (1980) (citation and internal quotation marks omitted) (holding that the rule of necessity is an exception to the recusal mandates in 28 U.S.C. § 455); *see also Atkins v. United States*, 556 F.2d 1028, 1036 (Ct. Cl.

1977) ("The rule . . . means that a judge is not disqualified . . . because of his personal interest in [a case] if there is no other judge available to . . . decide the case."). Appellant sued all of the active and senior judges serving on this court at the time of his complaint. One judge has begun to serve since then. Accordingly, it is impossible for this court to convene a three-member panel consisting of circuit judges that are not a party to this suit. Under the rule of necessity, then, neither this court nor this panel is disqualified from hearing and resolving this appeal. *See Pilla v. American Bar Ass'n*, 542 F.2d 56, 59 (8th Cir. 1976) (under the rule of necessity, "where all are disqualified, none are disqualified") (citation omitted). That it is possible to convene a disinterested panel in another circuit does not require transfer here, where appellant has indiscriminately named all then-current Second Circuit judges as defendants, even those who had no role in deciding either of his appeals. *See In re City of Houston*, 745 F.2d 925, 930-31 n.9 (5th Cir. 1984) (noting that an otherwise disqualified judge can invoke the rule of necessity to hear a case when all judges in his district are disqualified even if there are qualified judges in other districts); *Andersen v. Roszkowski*, 681 F. Supp. 1284, 1289 (N.D. Ill. 1988) ("The Court will not allow plaintiffs to impede the administration of justice by suing every district court judge [in this district] until their case is transferred out of the Seventh Circuit."), *aff'd*, 894 F.2d 1338 (7th Cir. 1990).

We turn now to the merits. Section 1915A requires that a district court screen a civil complaint brought by a prisoner against a governmental entity or its agents and dismiss the complaint *sua sponte* if, *inter alia*, the complaint is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(a) & (b)(1). We have not previously decided what standard of review applies to an appeal of a dismissal pursuant to Section 1915A, and we need not do so here. Under either a *de novo* or abuse of

discretion standard, the district court's order must be affirmed.

A complaint is frivolous when, among other things, it "is based on an indisputably meritless legal theory," *i.e.*, it "lacks an arguable basis in law." *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (citation and internal quotation marks omitted). The claim that the defendants engaged in a RICO conspiracy by failing to properly address issues on appeal and "bribing" witnesses to testify pursuant to plea agreements lacks any arguable basis in law and was properly dismissed as frivolous. Moreover, the complaint falls well short of stating a valid claim because it is devoid of any factual allegations supporting appellant's claims of a criminal conspiracy. He alleged no facts establishing that the circuit judges engaged in a conspiracy to obstruct justice; no facts establishing how the district judge and the AUSA joined the circuit judges in this alleged conspiracy; and no facts establishing that the defendants agreed to participate in a criminal conspiracy. The complaint's conclusory, vague, and general allegations of a criminal conspiracy do not therefore suffice to establish that the defendants participated in a "pattern of racketeering activity" as prohibited by RICO, 18 U.S.C. § 1962. *See, e.g., Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (dismissing RICO claims because conspiracy allegations were conclusory); *see generally De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996) (dismissing RICO claims where pleadings were "devoid of any specific facts or circumstances"); *Polur v. Raffe*, 912 F.2d 52, 56 (2d Cir. 1990) (dismissing claims based on allegations of a conspiracy where plaintiff "relie[d] on diffuse averments but [did] not provide a factual basis for his claim or plead overt acts indicating the existence of a conspiracy"); *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983) ("A complaint containing only conclusory, vague, or general allegations of conspiracy . . . cannot withstand . . .

dismiss[al]."). The complaint, therefore, both is frivolous and fails to state a valid claim.

It is also malicious. The manifest purpose of appellant's complaint was not to rectify any cognizable harm, but only to harass and disparage the AUSA who prosecuted him, the district judge who sentenced him and rendered a civil judgment against him, and the appellate panel that decided his appeals. Indeed, the primary "relief" appellant seeks is the convening of a grand jury to investigate the defendants' alleged crimes. Section 1915A not only allows, but expressly requires, district courts to dismiss such invectives. *See* 28 U.S.C. § 1915A(b)(1) (providing that a district court "shall" dismiss a complaint when it is "frivolous, malicious, or fails to state a claim upon which relief may be granted").

We therefore affirm.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 98 Civ. 7259 (AGS)

JUAN ANTONIO TAPIA-ORTIZ,

Plaintiff,

-against-

RALPH K. WINTER, AMALYA LYLE KEARSE, JOHN M. WALKER, JR., JOSEPH M. MCLAUGHLIN, DENNIS G. JACOBS, PIERRE N. LEVAL, GUIDO CALABRESI, JOSE A. CABRANES, FRANK I. PARKER, CHESTER J. STRAUB, ROSEMARY S. POOLER, ROBERT D. SACK, J. EDWARD LUMBARD, WILFRED FEINBERG, JAMES L. OAKES, ELLSWORTH A. VAN GRAAFEILAND, THOMAS J. MESKILL, JON O. NEWMAN, RICHARD J. CARDAMONE, ROGER J. MINER, FRANK X. ALTIMARI, THOMAS C. PLATT, JR., ANDREW WEISSMANN, EILEEN SHAPIRO, and several unknown staff attorneys,

Defendants.

ORDER

ALLEN G. SCHWARTZ, District Judge:

Plaintiff Juan Antonio Tapia-Ortiz, appearing *pro se* and having paid the statutory filing fee, brings this action

pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* Plaintiff appears to be dissatisfied with the disposition of his case before the United States District Court for the Eastern District of New York. *See Tapia-Ortiz v. McGurck*, 94-CV-2673 (TCP), *appeal dismissed*, No. 98-6103 (2d Cir. 1998). He seeks declaratory and injunctive relief. He also seeks, *inter alia*, to appear before a special grand jury pursuant to 18 U.S.C. § 3332(a). For the reasons set forth below, the complaint is dismissed.

Plaintiff's complaint is subject to dismissal, *sua sponte*, pursuant to the Prison Litigation Reform Act of 1995 ("PLRA"). Section 1915A of Title 28 provides the following:

> (a) Screening. – The Court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
> (b) Grounds for dismissal. – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint –
>
> (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
>
> (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A. *Crawford-El v. Britton*, ___ U.S. ___, 118 S.Ct. 1584, 1596 (1998); *Leonard v. Lacy*, 88 F.3d 181, 185 (2d Cir. 1996). After screening the instant complaint, this Court finds that it must be dismissed because it is frivolous and malicious within the meaning of § 1915A. *Sandles v. Randa*, 945 F.Supp. 169, 171 (E.D. Wis. 1996) (claim that United States Attorney's Office and judges fabricated a statute with the specific goal of imprisoning

inmate was factually and legally frivolous and thus subject to dismissal under the PLRA).

"[C]laims under RICO are subject to a high level of scrutiny due to their potential for abuse by civil litigants." *Maltezos v. Marine Terrace Apartments*, No. 87 Civ. 7347 (KMW), 1990 WL 52112, at *2 (S.D.N.Y. Apr. 13, 1990). In order to sustain an action under RICO, plaintiff must allege that the defendants have violated substantive provisions of the criminal RICO statute. 18 U.S.C. § 1964(c). The substantive provision of RICO prohibits the conduct of an enterprise engaged in, or whose activities affect, interstate commerce through a pattern of racketeering activity. 18 U.S.C. § 1962. *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990). Here, plaintiff fails to meet even minimal RICO pleading requirements, and as such, the claim is dismissed as frivolous and malicious.

Indeed, plaintiff has not alleged a cognizable "pattern of racketeering activity." *See* 18 U.S.C. § 1962(a); *GICC Capital Corp. v. Technology Finance Group, Inc.*, 67 F.3d 463, 465 (2d Cir. 1995), *cert. denied*, 518 U.S. 1617 (1996). To establish a pattern of racketeering activity, Tapia-Ortiz's complaint must list at least two predicate acts of racketeering that each of the other defendants personally committed or agreed to commit. *See Azrielli v. Cohen Law Offices*, 21 F.3d 512, 520-21 (2d Cir. 1994); *see also* 18 U.S.C. § 1961(1) (defining "racketeering activity"). Notwithstanding plaintiff's unsupported allegation that "[t]he pattern of racketeering activity appears to be comprised of thousands of predicate acts of extortion and obstruction of justice," Complaint at 13, plaintiff fails to satisfy the RICO requirements set forth above.

Conclusion

Accordingly, the complaint is dismissed as frivolous and malicious pursuant to the Prison Litigation Reform Act of 1996, 28 U.S.C. § 1915A. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would

not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

/s/ Allen G. Schwartz
ALLEN G. SCHWARTZ
United States District Judge

Dated: New York, New York
October 22, 1998

APPENDIX D

In The

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN ANTONIO TAPIA-ORTIZ,
Plaintiff,

v.

RALPH K. WINTER, AMALYA LYLE KEARSE, JOHN M. WALKER, JR., JOSEPH M. MCLAUGHLIN, DENNIS G. JACOBS, PIERRE N. LEVAL, GUIDO CALABRESI, JOSE A. CABRANES, FRANK I. PARKER, CHESTER J. STRAUB, ROSEMARY S. POOLER, ROBERT D. SACK, J. EDWARD LUMBARD, WILFRED FEINBERG, JAMES L. OAKES, ELLSWORTH A. VAN GRAAFEILAND, THOMAS J. MESKILL, JON O. NEWMAN, RICHARD J. CARDAMONE, ROGER J. MINER, FRANK X. ALTIMARI, THOMAS C. PLATT, JR., ANDREW WEISSMANN, EILEEN SHAPIRO, and several unknown staff attorneys,

Defendants.

STATEMENT OF THE CASE

Plaintiff, like many others before him, has been defrauded of judgment in the Second Circuit Court of Appeals by staff attorneys and appellate judges themselves.

A complaint that appears to be endemic to the "judgments" of the Second Circuit is that the *issues raised* are not the *issues addressed.*

Plaintiff has further been deprived of his liberty and property in the obstruction-of-justice R.I.C.O. conspiracy described herein.

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to:
2. 18 U.S.C. § 1964(a)

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

3. 28 U.S.C. § 1331, the general federal question statute.

4. 28 U.S.C. § 2201and § 2202, the federal declaratory relief and injunctive relief statutes, to declare the rights of parties.

5. 18 U.S.C. § 3332(a), the special grand jury statute that *mandates* presentation of plaintiff's evidence to a special grand jury.

PARTIES

6. Plaintiff Juan Antonio Tapia-Ortiz is a federal prisoner with an address of Unit 3B, FCI Allenwood, Post Office Box 2000, White Deer, Pennsylvania 17887.

7. Defendant Ralph K. Winter is the Chief Judge of the United States Court of Appeals for the Second Circuit with a business address of United States Courthouse, 141 Church Street, New Haven, Connecticut 06510.

8. Defendant Amalya Lyle Kearse is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of United States Courthouse, 40 Foley Square, New York, New York 10007.

9. Defendant John M. Walker, Jr. is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a

business address of United States Courthouse, 500 Pearl Street, New York, New York 10007.

10. Defendant Joseph M. McLaughlin is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of 2402 United States Courthouse, 40 Foley Square, New York, New York 10007.

11. Defendant Dennis G. Jacobs is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address United States Courthouse, 40 Foley Square, New York, New York 10007.

12. Defendant Pierre N. Leval is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of 1902 United States Courthouse, 40 Foley Square, New York, New York 10007.

13. Defendant Guido Calabresi is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of United States Courthouse, 157 Church Street, New Haven, Connecticut 06510.

14. Defendant Jose A. Cabranes is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of United States Courthouse, 141 Church Street, New Haven, Connecticut 06510.

15. Defendant Frank I. Parker is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of 11 Elmwood Avenue, 5th Floor, Burlington, Vermont 05401.

16. Defendant Chester J. Straub is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of United States Courthouse, 40 Foley Square, New York, New York 10007.

17. Defendant Rosemary S. Pooler is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of United States Courthouse, 40 Foley Square, New York, New York 10007.

18. Defendant Robert D. Sack is a Circuit Judge of the United States Court of Appeals for the Second Circuit with a

business address of United States Courthouse, 40 Foley Square, New York, New York 10007.

19. Defendant J. Edward Lumbard is a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of United States Courthouse, 40 Foley Square, New York, New York 10007.

20. Defendant Wilfred Feinberg is a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of United States Courthouse, 40 Foley Square, New York, New York 10007.

21. Defendant James L. Oakes is a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of 2204 Main Street, Brattleboro, Vermont 05301.

22. Defendant Ellsworth A. Van Graafeiland is a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of 423 Federal Building, 100 State Street, Rochester, New York 14614.

23. Defendant Thomas J. Meskill is a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of Old Post Office Plaza, Suite 204, 114 West Main Street, New Britain, Connecticut 06051.

24. Defendant Jon O. Newman is a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of 450 Main Street, Hartford, Connecticut 06103.

25. Defendant Richard J. Cardamone is a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of 10 Broad Street, Utica, New York 13501.

26. Defendant Roger J. Miner is a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit with a business address of 414 United States Courthouse, 445 Broadway, Albany, New York 12207.

27. Defendant Frank X. Altimari is a Senior Circuit Judge of the United States Court of Appeals for the Second

Circuit with a business address of Long Island Courthouse, 2 Uniondale Avenue, Uniondale, New York 11553.

28. Defendant Thomas C. Platt, Jr. is a federal District Judge in the Eastern District of New York with a business address of United States Courthouse, 2 Uniondale Avenue, Uniondale, New York 11553.

29. Defendant Andrew Weissmann is an Assistant United States Attorney in the Eastern District of New York with a business address of 225 Cadman Plaza East, Brooklyn, New York 11201.

30. Defendant Eileen Shapiro is a Senior Staff Attorney of the United States Court of Appeals for the Second Circuit with a business address of United States Courthouse, 40 Foley Square, New York, New York 10007.

31. Defendant staff attorneys participating in the obstruction of justice conspiracy described herein are unknown to the plaintiff at the present time.

FACTS

32. Plaintiff filed a Federal Tort Claims Act action in the Eastern District of New York against Drug Enforcement Agents who broke his ribs and inflicted other injuries upon him, *Juan Antonio Tapia-Ortiz v. Michal McGurk, et al.*, 94-CV-2673 (TCP).

33. That action was converted from a Federal Tort Claims Act action to a *Bivens* action by defendant Judge Thomas C. Platt, Jr. and then dismissed for being beyond the statute of limitations. See page 2 of the April 16, 1998 Memorandum and Order in that action.

34. That action was then appealed to the Second Circuit Court of Appeals, no. 98-6103.

35. Defendant judges have established a pattern of not addressing the *issues raised.*

36. In *United States v. Hansel*, 70 F.3d 6, 8 (2nd Cir. 1995) the deciding panel stated:

> Hansel's objection to the presence of a government attorney during the grand jury proceedings fails, because Rule 6(d) of the Federal Rules of Criminal Procedure expressly states that government attorneys may "be present while the grand jury is in session."

37. This was *not* the issue Hansel raised. What Hansel raised was the issue of whether or not Congress had the *authority* to *change* the *mode* of *proceeding* from what the authors of the indictment by grand jury intended that proceeding to be.

38. Hansel's appeal brief is attached hereto as Exhibit A, docket no. 95-1226.

39. Hansel and another litigant, Mike Brown, then sued the Second Circuit Court of Appeals itself (among other parties) for their dishonesty and obstruction of justice in "evading the issue" noted herein.

40. *That* case, no. 97-6107, was then addressed in the following manner:

> Here, the district court reached the proper result because the plaintiffs' sparse pleadings reveal no basis for a claim against any of the defendants and no actual controversy with any of the defendants.
>
> "The existence of a real case or controversy is an irreducible minimum of the jurisdiction of the federal courts." *United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982)). This requirment applies even to requests for declaratory relief. *See Ashcroft v. Mattis*, 431 U.S. 171 (1977). Here, the face of each complaint submitted by the plaintiffs revealed (1) that Hansel has already litigated the issue of Rule 6(d)'s constitutionality, and lost, and (2) that Brown's conviction occurred than twenty years ago. No other facts are provided that indicate a current or threatened

> proceeding against either plaintiff. Indeed, the plaintiffs failed to allege even that they are subject to continuing harm from their existing convictions. Thus, the district court lacked jurisdiction to issue the declaratory relief sought by the plaintiffs.
>
> See Exhibit B, attached hereto, Summary Order, page 4.

41. The statement that "Hansel has already litigated the issue of Rule 6(d)'s constitutionality and lost, . . ." is dishonest and misleading. Once again the appellate panel refused to address the issue raised.

42. "Continuing harm" flows from *any* felony conviction these days. See e.g., 18 U.S.C. § 922(g) (convicted felon in possession of a firearm).

43. This type of judicial dishonesty has not gone unnoticed among the defendant judges:

> Before undertaking the unpleasant task of discussing where I believe the district court erred, I find it necessary to undertake the even more unpleasant task of commenting briefly upon my colleagues' amended opinion, a substantial portion of which is devoted to a rebuttal of arguments that Pan Am never made.
>
> *Air Disaster At Lockerbie, Scotland On 12-21-88*, 37 F.3d 804, 830-831 (2nd Cir. 1994) (dissent).

44. Over one hundred years ago a letter to the editor became famous nationwide and is still well-known today:

> Dear Editor: I am 8 years old. Some of my little friends say, there is no Santa Claus. Papa says "If you see it in the Sun it's so." Please tell me the truth is there a Santa Claus? Virginia O'Hanlon
>
> New York Sun, Sept. 21, 1897

45. An editorial writer for the Sun, Francis Pharcellus Church, answered with a few hundred words that included the immortal phrase, "Yes, Virginia, there is a Santa Claus." He assured Virginia that her friends had "been affected by the skepticism of a skeptical age."

46. Over ninety-eight years later a commentary editor in a well-known newspaper, Eric Ringham of the Star Tribune wrote an article entitled, "Yes, Virginia, your dad sidestepped the question." See Star Tribune, December 22, 1995, page 21A.

47. In *United States v. Hansel*, supra, the defendant judges adopted the same line of reasoning that a parent does with a child and sidestepped the question of the constitutionality of Federal Rule of Criminal Procedure 6(d) in their published opinion. They merely stated that the rule says what it says and *nothing* more.

48. Then defendant judges in *Hansel v. United States*, supra, ruled that the issue of Rule 6(d)'s constitutionality had already been adjudicated. They have resorted to being contortion artists of the English language, a method rampant today in American society. In his famous essay, "Politics and the English Language" George Orwell wrote:

> The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words and exhausted idioms, like cuttlefish squirting out ink.
>
> *Shooting an Elephant* (1950)

49. History has shown us that other governments have had problems with judges circumventing the law and substituting their own version in oppressing their citizens:

> The bending of the meanings of words is symptomatic of a diseased institution, with the angle of linguistic deflection indicating the seriousness of the cancer within. The Spanish Inquisition represented an advanced case.

Rawson's Dictionary of Euphemisms and Other Doubletalk, Revised Edition, page 35 (1995).

The judge who knows other judges have erred, but agrees because he does not want to shame them, will end in *Gehenna*.

Leo Rosten's Treasury of Jewish Quotations, page 316 (1972).

50. Plaintiff's liberty and property were confiscated at the hands of defendant Judge Thomas C. Platt, Jr., cases found at 55 F.3d 78, 23 F.3d 738, 855 F.Supp. 50, 849 F.Supp. 6.

51. Defendant Judge Thomas C. Platt, Jr. appears to be biased against blacks and Hispanics, in addition to suffering from a deteriorating mental condition. See attachment to 28 U.S.C. § 372 Complaint for Judicial Misconduct, attached hereto as Exhibit C.

52. That defendant Assistant United States Attorney Andrew Weissmann *bribed* the witnesses who testified against this plaintiff in his criminal case with lighter sentences in exchange for their testimony is irrefutable. See trial transcript in case no. CR 91-1014, United States District Court, Eastern District of New York for February 10, 1992 and February 11, 1992. Such conduct violates 18 U.S.C. § 201(c)(2).

53. Government witness Hector Hernandez was sentenced to eighteen (18) months, not to the "mandatory minimum" of ten (10) years that he testified to at plaintiff's criminal trial.

54. During plaintiff's criminal trial the government presented to the jury the plea hearing transcript of Hector Hernandez. This was presented as a government exhibit, a copy of which was given to plaintiff by his lawyer. The copy which plaintiff received did not contain all the pages of the plea hearing transcript. Only the first three pages were that

of the plea hearing transcript of Hector Hernandez. The other remaining pages were from a different proceeding. Plaintiff hired a private investigator who informed plaintiff that someone had pulled the plea hearing transcript of Hector Hernandez from plaintiff's trial record in the court's archives.

55. Only one person would have and could have pulled a stunt like this—defendant Assistant United States Attorney Andrew Weissmann.

56. Plaintiff is informed and believes thereon that defendant Weissmann is known for "hiding evidence" and has been sanctioned for such behavior in the past.

57. Plaintiff is further informed and believes thereon that staff attorneys, not Article III judges, are the ones actually deciding Second Circuit cases. Such decisions are then presented to Article III judges, who were approved by Congress, for rubber-stamp approval, denying plaintiff of *meaningful* access to the courts.

LEGAL CLAIMS

I

58. The behavior of the defendants named herein has been recognized as violative of federal criminal law since prior to World War II:

> The indictment names as defendants Manton, Spector, Fallon, Lotsch and Davis, and alleges that they, together with Archie M. Andrews, now deceased, Alfred F. Reilly and Almon B. Hall, and divers other persons to the grand jurors unknown, conspired to commit offenses against the United States, to wit: corruptly to endeavor to influence, obstruct and impede the due administration of justice in suits pending before certain courts of the United States; and to defraud the United States of and concerning its right to have the lawful functions of the judicial power of the United States exercised and administered free from unlawful

impairment and obstruction, and more particularly its right to the conscientious, faithful, disinterested and unbiased judgment and action of the defendant Manton as the Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Circuit free from corruption, partiality, improper influence, bias, dishonesty and fraud.

United States v. Manton, 107 F.2d 834 (2nd Cir. 1938).

59. The paramount questions in this action are these:

a. Is a litigant entitled to have a judge or panel of judges *address* the *issue(s) raised*?

b. Is the deliberate and willful failure to address the issue(s) raised a predicate act under R.I.C.O. pursuant to the Obstruction of Justice statute, 18 U.S.C. § 1503?

60. If the answers to the above questions are both "no," then this Court should plainly so state and allow the people, through their elected representatives, to correct a court system so corrupt that it is worse than totally useless: it is an instrument of oppression.

61. I.e., has appeal of right become a mere "fig leaf" for unbridled exercise of trial court judges? See Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale Law Journal 62, 98 (1985).

62. If the answer to either of the above questions (59a and 59b) is "yes," then this Court needs to address whether this principle should include federal judges: Agencies must respond to the arguments made to them. *Lwin v. I.N.S.*, 144 F.3d 505, 512 (7th Cir. 1998).

II

63. [A] plaintiff may seek declaratory relief before actual harm occurs if she has a reasonable apprehension of that harm occurring. *United States v. Colorado Supreme Court*, 87 F.3d 1161, 1166 (10th Cir. 1996).

64. Plaintiff has more than a "reasonable apprehension" that the deciding panel in 98-6103 will not address the issues raised and will rob him of the judgment that is rightfully his.

III

65. Any proceeding in front of a biased judge is a violation of due process. A judge who is not impartial is a structural error. Structural error requires that a conviction be overturned. *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1717 (1993).

66. This cannot and will not happen in front of the defendant appellate judges sitting on the Second Court of Appeals either from bias, corruption, or sheer laziness.

67. A judge who is not mentally competent violates due process. *Jordan v. Massachusetts*, 32 S.Ct. 651, 652 (1912).

IV

R.I.C.O.

68. A R.I.C.O. enterprise may include courts. *United States v. Angelilli*, 660 F.2d 23 (2nd Cir. 1981).

The Enterprise

69. The R.I.C.O. enterprise described herein consists of the defendant appellate judges of the Second Circuit Court of Appeals, the defendant staff attorneys attendant thereon, the defendant Judge Thomas C. Platt, Jr., defendant Assistant United States Attorney Andrew Weissmann, and others presently unknown to the plaintiff.

The Pattern of Racketeering Activity

70. The pattern of racketeering activity appears to be comprised of thousands of predicate acts of extortion and

obstruction of justice in violation of 18 U.S.C. § 1503 and bribing of witnesses, in violation of 18 U.S.C. § 201(c)(2), spanning a time frame of (at least) 1991 to the present day.

V
The Predicate Acts

71. A conviction for extortion within the meaning of the Hobbs Act requires that the defendants obtained "property from another, without his consent, induced by wrongful use of actual or threatened force, violence, or fear, *or* under color of official right." 18 U.S.C. § 1951 (b)(2). Here there was (1) extortion by wrongful use of fear, specifically, fear of *economic harm* or loss, and (2) extortion under color of official right.

72. Proof of an explicit promise to perform the official acts in return for the payment is not required. See *United States v. Coyne*, 4 F.3d 100, 111 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 929 (1994).

73. The predicate acts of extortion, obstruction of justice, mail fraud, and wire fraud undoubtedly number in the thousands. However, for the purpose of this action, the predicate acts complained of herein can be found within cases:

98-6103, 97-6107
70 F.3d 6
55 F.3d 78
23 F.3d 738
855 F.Supp. 6
840 F.Supp. 50

74. This activity has taken and continues to take place from 1994 to 1998.

VI
Fraud Upon The Court

75. A court can commit fraud upon itself. *United States v. Manton*, supra.

76. Under elementary principles of fairness and justice, actions seeking relief from judgments based on alleged fraud upon the court should be treated as continuations of the former action. See 7 James W. Moore, *Moore's Federal Practice*, Para(s) 60.38[1], at 60-399 (2nd ed. 1995).

77. Nor may the defendants claim immunity from either declaratory relief or criminal prosecution in this action.

78. An action seeking relief from judgment for fraud upon the court, which is brought in the very court that rendered the judgement in favor of the government, should be viewed as "a continuation of the former suit, on the question of . . . jurisdiction," see *Pacific R.R. v. Missouri Pac. Ry.*, 111 U.S. 505, 522 (1884)), regardless of whether the government gave its consent.

79. No rule contemplates the abdication by the court of its decisionmaking responsibility.

80. An individual's right to an impartial and independent tribunal is subject to waiver like any other fundamental, personal right guaranteed by the Constitution. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-849 (1986).

81. Plaintiff engaged in no such waiver.

RELIEF REQUESTED

1. That plaintiff be allowed to present his evidence to a special grand jury, pursuant to the provision of 18 U.S.C. § 3332(a).

2. That this Court convene a grand jury to investigate the crimes complained of herein, pursuant to Federal Rule of Criminal Procedure 6(a).

3. That this Court issue a declaratory judgement, pursuant to 28 U.S.C. § 2201 and § 2202, that appellate panels must address the *issue(s) raised.*

4. That the deliberate failure of an appellate panel to address issues raised constitutes obstruction of justice, in violation of 18 U.S.C. § 1503, denial of meaningful access to

the courts, and violation(s) of 18 U.S.C. § 1951(b)(2), pursuant to 28 U.S.C. § 2201 and § 2202.

5. That defendant Judge Thomas C. Platt, Jr. be declared biased and/or mentally incompetent.

6. That defendant Judge Thomas C. Platt, Jr. be compelled to undergo a mental and physical examination, pursuant to Federal Rule of Civil Procedure 35 (a).

7. That defendant Assistant United States Attorney Andrew Weissmann be sanctioned for hiding evidence and/or bribing witnesses.

8. That all Second Circuit appellate and district court judges be recused from adjudicating this action, pursuant to 18 U.S.C. § 144 and § 455.

9. That a special prosecutor be appointed, uncontaminated by any association with any of the judicial or prosecutorial officers in the Second Circuit, to present plaintiff's evidence to the special grand jury.

Respectfully submitted,

Date: October 15, 1998

/s/ Juan Antonio Tapia-Ortiz

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